

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GUENTHER H. BARTSCH</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 819558</b>
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1995 through November 30, 1997.	:	

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Petitioner, Guenther H. Bartsch, 6 Meadow Gate East, St. James, New York 11780, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1995 through November 30, 1997.

The Division of Taxation (“Division”) appearing by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel) brought a motion for an order dismissing the petition pursuant to Tax Law § 2006(5). Petitioner appeared by Blaustein & Weinick (Mark R. Blaustein, Esq., of counsel). The Division submitted a Notice of Motion for an order dismissing the petition with attached exhibits. In response, petitioner submitted a memorandum in opposition. The Division of Taxation submitted a reply on January 28, 2004 which began the 90-day period for the issuance of this determination.

Upon review of the pleadings with attachments of Kevin R. Law, Esq., in support of the Division’s motion, the opposition to said motion by Mark R. Blaustein, Esq., and the Division’s reply to the opposition, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation is entitled to an order of dismissal of the petition on the basis that the refund sought by the petition is precluded by petitioner's representative's execution of a Withdrawal of Protest form.

***FINDINGS OF FACT***

1. The Division issued a Notice of Determination to petitioner, Guenther H. Bartsch, number L-015070637, dated June 12, 1998, asserting that sales and use tax was due in the amount of \$30,672.17 plus penalty and interest. The notice explained that petitioner was a responsible officer or person of JNR, Ltd. for the quarters ended May 31, 1995 and August 31, 1995. The Division also issued a Notice of Determination to petitioner, number L-015892985, dated November 23, 1998, asserting that tax was due in the amount of \$1,258,924.19 plus penalty and interest. The second notice similarly explained that petitioner was a responsible officer or person of JNR, Ltd. for the quarters ended November 30, 1995 through November 30, 1997.

2. Petitioner filed a request for a conciliation conference with respect to each of the notices of determination. As a result of the conference, petitioner agreed to withdraw his protest and pay a revised tax if penalties were waived. The Division accepted this proposal and the notice which assessed tax for the quarters ended May 31, 1995 and August 31, 1995 was reduced to \$12,428.57 plus simple interest. The second notice, which assessed tax for the quarters ended November 30, 1995 through November 30, 1997, was reduced to \$82,400.40 plus simple interest. Thereafter, petitioner, through his representative, signed a Withdrawal of Protest form. The following paragraph, among other things, appears above the signature on the form:

I hereby withdraw the protest for redetermination of deficiency or revision of determination and any refund claim asserted therein and I consent to a discontinuance of the case initiated by the filing of such protest. I waive any right to a conciliation conference and a hearing in the Division of Tax Appeals concerning the above notice. For estate tax purposes, I waive my right to a special proceeding before the Surrogate Court.

3. On July 25, 2000, petitioner made an initial payment of \$50,000.00 toward the agreed upon liability. On or about October 14, 2000, the balance of the agreed upon liability was paid.

4. On or about June 6, 2002, petitioner filed claims for refund of the revised amounts paid with respect to notices of determination L-015070637 and L-01582985.

5. In a letter dated June 6, 2003, the Division denied petitioner's claim for refund on the basis of Tax Law § 1139(c). The Division explained that the refund claim was denied because it pertained to a matter which was adjudicated by the Bureau of Conciliation and Mediation Services. On July 11, 2003, the Division of Tax Appeals received a petition challenging the denial of the refund.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

6. In support of its motion, the Division first argues that the execution of the withdrawal of protest form by petitioner precludes him from claiming a refund of tax paid pursuant to that form. In the alternative, the Division maintains that, assuming *arguendo* that a taxpayer could file a claim for refund of sales tax after executing a withdrawal of protest form, Tax Law former § 1139(c) bars refunds for tax paid prior to January 1, 1997.

7. In response, petitioner argues that by relying upon Tax Law § 2006(5) and the Tribunal's Rules of Practice and Procedure, 20 NYCRR 3000.9, the Division did not specify which of the enumerated grounds for dismissal it is relying upon. It is submitted that the enumerated grounds do not apply. Petitioner further contends that the Division did not explain

why dismissal of the entire case under Tax Law § 1139(c) would be appropriate because a majority of the refund would not be allowable. According to petitioner, the execution of the Withdrawal of Protest form did not preclude him from claiming a refund because the form did not constitute a closing agreement and was not a conclusive determination of tax liability.

Petitioner posits that the cases relied upon by the Division are inapposite because, in this matter, petitioner executed a Withdrawal of Protest form whereas, in the cases cited by the Division, the taxpayer signed a Withdrawal of Petition and Discontinuance of Case form. Petitioner notes that this proceeding challenges the denial of a refund claim and not a notice of determination. With respect to the alternative argument advanced by the Division, petitioner maintains that Tax Law former § 1139(c) does not bar him from filing claims for refunds because he did not exhaust administrative and judicial remedies.

8. In its reply brief, the Division contends that the motion to dismiss may be founded upon documentary evidence consisting of the withdrawal of protest (Tax Law § 2006[5][i]; 20 NYCRR 3000.9[a][1][i]) or upon payment and release (Tax Law § 2006[5][v]; 20 NYCRR 3000.9[a][1][v]). The Division also posits that its motion to dismiss could be treated as a motion for summary determination. Lastly, the Division notes that petitioner's brief improperly relied upon a determination of an administrative law judge. In this regard, the Division pointed out that the error may have been caused by a publishing company which erroneously labeled the matter as a decision of the Tax Appeals Tribunal.

### ***CONCLUSIONS OF LAW***

A. Section 3000.9(a)(1) of the Rules of Practice and Procedure states that "A party may move to dismiss a petition on the grounds that (i) a defense is founded upon documentary

evidence.” This is precisely what the Division has done through its motion which asserts that the execution of the Withdrawal of Protest form precluded claiming a refund of the tax which was paid pursuant to that form. Accordingly, petitioner’s claim that the grounds for dismissal set forth in 20 NYCRR 3000.9(a) do not apply is rejected.

B. The Division’s argument that petitioner’s claim for refund is barred by the Withdrawal of Protest form has merit. In *Matter of Westbury Smoke Stax, Ltd. v. New York State Tax Commn.* (142 AD2d 878, 531 NYS2d 65, *lv denied* 73 NY2d 706, 539 NYS2d 299), the taxpayer and the Division reached an agreement as to the amount of the liability for tax and interest. Subsequently, the taxpayer withdrew his petition and discontinued his case. Petitioner paid the agreed upon amount of penalty and interest under protest and thereafter sought to reopen the matter on the grounds that the settlement agreement was predicated on payment of interest only from the date of settlement, not the date the tax was due. The Court affirmed the dismissal of the petition and held that the taxpayer’s right to hearing was forfeited when he entered into the settlement agreement with the Division. Specifically, the Court stated that “the withdrawal of the petition for redetermination of the initial assessment resulted in a determination by consent, subsequent to the opportunity for a hearing, and thus resulted in the forfeiture of a right to an additional hearing (*see*, Tax Law § 1139[c]).” (*Id.*, 531 NYS2d at 66-67.) Similarly, in this case, there was a determination by consent subsequent to the opportunity for a hearing. Accordingly, by the express terms of his agreement and by operation of law, petitioner has waived his right to claim a refund.

C. Petitioner asserts that *Matter of Westbury Smoke Stax, Ltd. v. New York State Tax Commn.* (*supra*) is inapposite because in that case the taxpayer executed a Withdrawal of

Petition and Discontinuance of Case whereas in this matter the taxpayer executed a Withdrawal of Protest. This argument is without merit. The basis for the decision in *Westbury* was that there was a determination by consent subsequent to the opportunity for a hearing. The same operative facts are controlling here.

D. In view of the resolution reached above, the Division's alternative argument is moot and will not be addressed.

E. Arguments based on citations to determinations of administrative law judges have not been addressed because such determinations may not be considered as precedent (Tax Law § 2010(5)).

F. The motion of the Division of Taxation for an order dismissing the petition is granted and the petition of Guenther H. Bartsch is dismissed.

DATED: Troy, New York  
April 22, 2004

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE